UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MERVYN FRANKEL,

Plaintiff,

- against -

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Defendants.

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06 Civ. 5450(LTS)(DFE)
07 Civ. 3436(LTS)(DFE)

MEMORANDUM AND ORDER
These are not ECF cases

DOUGLAS F. EATON, United States Magistrate Judge.

Pursuant to my Memorandum and Order dated January 3, 2008, I have received three faxes concerning the dispute about defendants' request for a protective order to protect the information contained in personnel files of City employees other than plaintiff:

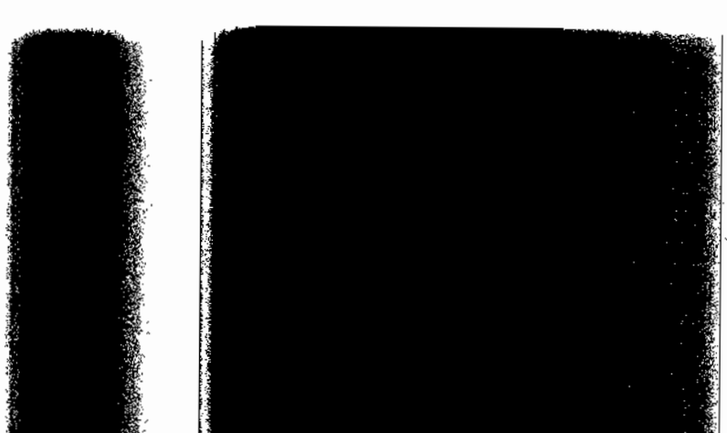
1/3/08 fax letter to me from plaintiff;

1/16/08 fax letter to me from ACC Madden, enclosing his proposed protective order;

1/16/08 fax reply from plaintiff; he lists 8 points, to which I now respond.

Point 1. Plaintiff denies that he agreed to the proposed order's ¶3 ("Plaintiff shall not use the Confidential Materials for any purpose other than for the preparation or presentation of plaintiff's case in this action") and ¶7 (plaintiff shall return the Confidential Materials within 30 days after the termination of this case). In my view, plaintiff should have agreed to ¶3 and ¶7; they are sensible, standard provisions. I will issue the protective order with slight changes to some of its other paragraphs. Also, I will delete the text about "stipulated and agreed," so the record is clear that plaintiff did not agree.

Point 2. Plaintiff asserts that "if plaintiff forgoes records of Jackie Holds as not being relevant to plaintiff's method of argument to prove his case, this protective order is an academic issue." Plaintiff's assertion is incorrect. The defendants have already produced personnel records about employees other than Jackie Holds, and the City wishes to protect



those records by retroactively designating specific ones as confidential. I see no prejudice to plaintiff. If plaintiff has revealed any of those records to a third party, then plaintiff would be well advised to make a clear record that he had made that revelation before he received the enclosed Protective Order.

Point 3. On its face, plaintiff's Point 3 does not sound like an objection. I believe it is probably an objection to ACC Madden's statement that he seeks "to have retroactive language in the protective order in case there were documents that inadvertently were produced without" being marked "confidential" and without even being specifically described in ¶1 or in a side letter. As far as I can tell, ACC Madden seeks to accomplish this with his ¶1(c), which sweeps "any documents identified by defendants as subject to this order" into the definition of "Confidential Materials." This is too broad, and gives the defendants too much power. Hence, I will delete ¶1(c). If plaintiff or defendant wants my protective order to protect any document or information that is not described in ¶1's subdivisions a, b, d, e or f, then that party must initiate a joint letter to me which submits the item to me and asks me to include it within the protection of my protective order.

Point 4. Plaintiff should be thankful that the defendants produced some personnel records before they thought of the need for a protective order. The defendants did raise this issue in a letter to me dated November 20, 2007; the reason I am forced to write about it at the "eleventh hour" is that plaintiff stubbornly refused to compromise on his objections, most of which were meritless in my view.

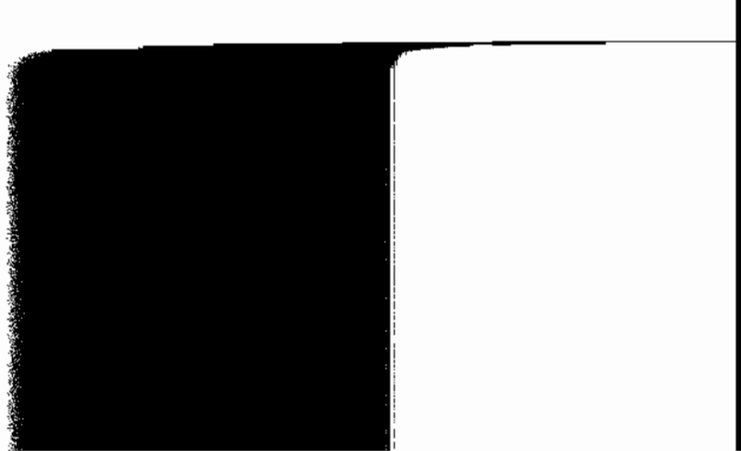
Point 5. This objection is solved by my deletion of ¶1(c).

Points 6 and 7. If plaintiff produced documents which he now thinks have a specific need for a protective order, then he must follow the last sentence of my discussion of Point 3. However, plaintiff has probably waived confidentiality to the extent that he has made public allegations in his lawsuits; by contrast, it seems that his co-workers have not waived their privacy.

Point 8. Plaintiff has offered a side letter in lieu of a protective order. But the co-workers' privacy is more fully protected by a court order.

I enclose my Protective Order.

Finally, in a fax letter to me dated January 8, 2008,



plaintiff says that he will be submitting a cross-motion for summary judgment. In an employment discrimination case, it is virtually impossible for a plaintiff to obtain summary judgment. Nevertheless, I hereby supplement Paragraph A on page 3 of my 1/3/08 Memorandum and Order as follows:

> A. **Any dispositive motions must be directed to me. Defendants' motion for summary judgment must be served and filed on or before March 7, 2008; plaintiff's opposing papers (and cross-motion, if any) must be served and filed on or before March 24, 2008; defendants' reply (and opposition to any cross-motion) must be served and filed on or before April 3, 2008. Plaintiff must not file any "surreply" as to defendants' motion; however, if plaintiff has made a cross-motion, he may serve a reply limited to that cross-motion on or before April 14, 2008.**

DOUGLAS F. EATON
United States Magistrate Judge
500 Pearl Street, Room 1360
New York, New York 10007
Telephone: (212) 805-6175
Fax: (212) 805-6181

Dated: New York, New York
January 17, 2008

Copies of this Memorandum and Order (and of my Protective Order) are being sent by mail to:

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Hon. Laura Taylor Swain